Supreme Court, U.S.
FILED

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No. 01-102 JUL 16 2001

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In The Supreme Court of the United States

ANDREA D. HATTEBERG,
Petitioner,

v.

ADAIR ENTERPRISES, INC.; FULBRIGHT & JAWORSKI, L.L.P.; STEWART W. GAGNON; JONATHAN GOLDHOR; DONALD O. JANSEN; JOY M. SOLOWAY; LISA D. HARBOUR; JERYL A. GOLUB; JOETTA JAŃCZAK; and JAMES RICHARD HATTEBERG,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petition for Writ of Certiorari

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42 pp

QUESTIONS PRESENTED FOR REVIEW

I. IN AFFIRMING THE MISUSE BY THE DISTRICT COURT OF NUMEROUS FEDERAL PROCEDURAL RULES AND STATUTES AND IN DISREGARDING ITS OWN PRECEDENT WITH RESPECT TO THE INTERPRETATION OF THOSE RULES AND STATUTES IN AN UNPUBLISHED OPINION, THE FIFTH CIRCUIT COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND NORMAL COURSE OF JUDICIAL PROCEEDINGS AND HAS SANCTIONED SUCH A DEPARTURE BY THE DISTRICT COURT, AS TO CALL FOR EXERCISE OF THIS COURT'S SUPERVISORY POWER.

II. IN FINDING THAT A PATTERN OF RACKETEERING ACTIVITY CAN NEVER BE SHOWN UNDER RICO IF THE ALLEGED PREDICATE ACTS ARE CONDUCTED DURING THE COURSE OF A SINGLE, OTHERWISE LAWFUL ENDEAVOR (SUCH AS LITIGATION), THE FIFTH CIRCUIT COURT OF APPEALS HAS ENTERED DECISIONS IN CONFLICT WITH OTHER COURTS OF APPEALS ON THE SAME IMPORTANT MATTER.

III. IN FINDING THAT ERISA PREEMPTS STATE LAW CLAIMS ARISING OUT OF STATE COURT PROCEEDINGS WHICH ARE REQUIRED UNDER THE FEDERAL STATUTE IN ORDER TO EFFECTUATE A DIVISION OF COMMUNITY RETIREMENT BENEFITS UPON DIVORCE, THE FIFTH CIRCUIT'S DECISION RAISES SERIOUS ISSUES OF FEDERALISM AND UNDERMINES CONGRESSIONAL INTENT WITH RESPECT TO THE IMPORTANT ISSUE OF THE NATION'S RETIREMENT SYSTEM, ESPECIALLY IN COMMUNITY PROPERTY STATES.

LIST OF PARTIES TO THE PROCEEDING

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OPINIONS AND ORDERS ENTERED IN THE CASE

(1) *Hatteberg v. Adair Enterprises, Inc., et al.*, No. MO-97-CA-209 (W.D. Tex. filed October 27, 1998) (opinion on summary judgment, reprinted in the Appendix (hereinafter "App.") at 1-16); **(2)** *Hatteberg v. Adair Enterprises, Inc., et al.*, No. MO-97-CA-209 and MO-99-CV-164 (W.D. Tex. filed December 29, 1999) (opinion denying reconsideration and order of severance, reprinted at App. 17-24); **(3)** *Hatteberg v. Adair Enterprises, Inc., et al.*, 239 F.3d 365 (5th Cir. 2000) (unpublished, *per curiam*, opinion of affirmance reprinted at App. 25-31); **(4)** *Hatteberg v. Adair Enterprises, Inc., et al.*, No. MO-97-CA-209 (W.D. Tex. filed August 3, 2000) (opinion on summary judgment, reprinted at App. 32-67).

JURISDICTION

The Fifth Circuit denied Petitioner Andrea Hatteberg's requests for reahearing in MO-99-CV-164 (hereinafter, "the non-ERISA claims") on April 17, 2001. App. 74. The jurisdiction of this Court to review that judgment is invoked under 28 U.S.C. §1254(1). Petitioner's appeal from the district court's judgment in MO-97-CV-209 (hereinafter "the ERISA claims"), which have been fully briefed and are pending in the Fifth Circuit, derive from the same facts as those upon which the judgment in MO-99-CV-164 was based. As argued below, the severance of the claims in the two actions was beyond the authority of the district court. Because the pending appeal in MO-97-CV-209 is fatally flawed as a result of the procedures used to reach that result, the jurisdiction of this Court to review that judgment is invoked under this Court's Rule 11.

CONSTITUTIONAL PROVISIONS, RULES, AND STATUTES INVOLVED

This case involves the Fifth and Seventh Amendments to the United States Constitution and numerous Federal Rules of Civil Procedure and federal statutes which are either set forth in the Appendix at 78-105 or in this Petition.

STATEMENT OF THE CASE

I. The Facts.

Because Petitioner's claims were dismissed on summary judgment, the summary judgment materials submitted to the district court are recited in the light most favorable to her. *Eastman Kodak Co. v. Image Technical Service, Inc.*, 504 U.S. 451, 456 (1992). In 1991, Petitioner sought a divorce from Respondent Richard Hatteberg and entry of a domestic relations order dividing community retirement benefits in a profit-sharing plan covered by the Employee Retirement Income Security of 1974 (ERISA), as amended, 29 U.S.C. §§1001-1461. At the time, Richard was an officer of Red Adair Company, Inc. (predecessor in interest to Respondent Adair Enterprises, Inc.) and a participant in the Plan. He was represented in the divorce proceedings by multiple attorneys with the law firm of Respondent Fulbright & Jaworski, L.L.P. Unbeknownst to Petitioner, the Company, at this same time, was also represented by multiple attorneys from the same firm on all corporate legal matters, including those related to the Plan.

During the divorce proceedings Richard and his attorneys, Respondents Gagnon, Harbour and Golub, misrepresented that the Hatteberg account had a "net value" of $475,027.74 on December 31, 1991, when actually the account balance was $894,981. They also failed to produce requested Plan documents, and Company employees purposefully eluded attempts to serve them with trial

subpoenas. Notwithstanding these uncertainties, on October 1, 1992 Judge John Montgomery entered a divorce decree naming Petitioner sole managing conservator of the couple's child and, over the objections of Petitioner's counsel, a separate "Qualified Domestic Relations Order" (QDRO) purporting to divide equally the community property retirement assets in the account. Petitioner's objections were grounded on Montgomery's application of a formula approved by the Texas courts for dividing benefits distributable under defined benefit plans. See *Berry v. Berry*, 647 S.W.2d 945 (Tex. 1983). In requesting that Montgomery overrule Petitioner's objections to use of the *Berry* formula, Gagnon approved the QDRO as to form and stated that the Plan was prepared to "kick out the money" to Petitioner immediately.

After entry of the QDRO, Gagnon wrote to Petitioner's appellate counsel stating that he had instructed Richard to turn over to him a tax refund check Richard had been ordered by Montgomery to endorse over to Petitioner, that he was holding the check in trust for Petitioner, and that if Petitioner cashed the check, he would treat that act as the waiver of any error by Montgomery. In December 1992, Petitioner perfected her appeal of certain aspects of the divorce decree, including the application of the *Berry* formula.

In December 1993, Petitioner sent a certified copy of the QDRO to the Company, requested that the Company provide her attorney with any information he requested in aid of executing the QDRO, and informed the Company that she intended to make a non-taxable transfer of the Plan benefits awarded to her to an individual retirement account (IRA). Company employees refused to provide the documents or information to Buck, or even speak to him, unless authorized to do so by Fulbright attorneys. The documents finally provided revealed that the Plan had been completely amended and restated in the midst of the divorce. The Plan's QDRO Procedures stated that the Company would not make

a distribution to Petitioner until she obtained "a final order of a State domestic relations court that has not been appealed, or has been finally resolved following appeal." The QDRO procedures were prepared by Respondent Goldhor, another Fulbright attorney, in response to Petitioner's QDRO.

Unbeknownst to Petitioner, on June 9, 1994, the Company amended the Plan purporting to terminate it retroactively as of December 31, 1993. This amendment provided for full vesting of all participants and allowed each participant to elect a lump sum distribution as soon as administratively practicable. At the request of Richard Bogatto, another Fulbright attorney, the Internal Revenue Service approved this amendment, as well as those effective prior to this one, and determined the amendments would not adversely affect its qualification for federal tax purposes. The Company had notified certain Plan participants and beneficiaries of its intent to request the determination letter and of their right to comment to the IRS on the Plan's qualified status in light of its termination but had not sent the notice to Petitioner.

The Company sent written notices and election forms to Plan beneficiaries advising them of their right to make a tax-qualified rollover distribution of their Plan benefits. The Company did not send these notices or election forms to Petitioner. Instead, on November 1, Respondent Janczak, the Plan's "QDRO Coordinator," informed the Hattebergs the Plan had been "liquidated" and that their community account had sustained losses. She offered to make a distribution to each of them pursuant to the 1992 QDRO that was still on appeal if each of them executed a broad form release and indemnification for any claim against "any person." The release specifically mentioned ERISA claims. Goldhor prepared the release. Janczak threatened that if either Hatteberg did not sign the release the Plan would be amended to charge directly against the Hatteberg account the Company's expenses for maintaining the account in the Plan. She specifically mentioned attorneys' fees and openly

acknowledged that this would reduce the amount of benefits each Hatteberg would ultimately receive. She stated that the Committee might, alternatively, pay the benefits "into the Court" and that this would require the expenditure of additional attorney's fees. Richard signed the release, but Petitioner did not.

Two days after Janczak's demand for a release, the state appellate court reversed Montgomery's use of the *Berry* formula and ordered the matter of the division of the retirement benefits remanded to him for a "proper division." *Hatteberg v. Hatteberg*, 933 S.W.2d 522, 531 (Tex. App. – Houston [1st Dist.] 1994, no writ). On November 14, again unbeknownst to Petitioner, the Plan made the bulk of the final distributions to other participants and beneficiaries in accordance with their elections. No distribution was made from the Hatteberg account. On November 23, Petitioner sent a letter to Richard, with a copy to Janczak, acknowledging the Company's desire to be relieved of responsibility for the account and suggesting that in light of the appellate court's reversal and remand the account funds be placed in a jointly controlled, qualified IRA or other retirement-type account, as long as the transfer would not constitute a taxable distribution. Petitioner received no response from Richard or Janczak.

In light of Petitioner's refusal to sign the release and the Company president's objection to expending corporate assets to maintain the "terminated" Plan just for the Hatteberg account, Goldhor advised the Company to amend the Plan again to place a hold on the Hatteberg account and to allow for the deduction of its QDRO-related expenses directly from that account. On January 16, 1995, Janczak announced the new scheme and transmitted revised QDRO procedures informing everyone of the scheme's intended consequences – to reduce the retirement benefits available to the Hattebergs in direct proportion to the amount of time it would take for the property settlement to be finalized.

On August 30, Petitioner renewed her requests to the Company for Plan documents and specific financial information about the assets awarded to her under the QDRO. Janczak refused to provide Petitioner with the requested financial information, stating Petitioner was not entitled to that information as a result of her appeal.

During this time, Richard and his attorneys were also attempting to pressure Petitioner into accepting Montgomery's improper division of the retirement account through other methods. The divorce decree appointing her sole managing conservator of the couple's child gave Petitioner the right to reasonable consultation with Richard's treating physician regarding the safety of the child during his periods of visitation with Richard and ordered Richard to cooperate in that consultation, not to interfere with Petitioner's efforts to consult with the physician, and to execute any and all appropriate medical authorizations necessary for the release of information on the issue of Richard's epilepsy as it related to his visitation rights. Richard continually thwarted Petitioner's efforts to consult with his physician.

In June 1994, Petitioner learned that Richard proposed to take their son on an extended driving trip. On August 3, Petitioner requested that Montgomery transfer orders relating to the child to the county of the child's residence for enforcement and filed a supporting affidavit stating that the child had resided with her in Midland County, Texas for six months. Under Texas statute, such a motion, when accompanied by an affidavit stating under oath that a child has resided in the proposed transferee county for six months, imposes a ministerial duty upon the court to make the transfer without a hearing as long as the sworn statement of the child's current residence is not controverted. *See Sokolosky v. McFall*, 750 S.W.2d 35, 38 (Tex. App. – Amarillo 1988, no writ); *Grossnickle v. Clayton*, 900 S.W.2d 404 (Tex. App. – Texarkana 1995, writ denied).

On September 9, Gagnon filed an "Affidavit Controverting Motion to Transfer" in which Richard swore that he had personal knowledge that a transfer of the protective orders to Midland County was not proper because Petitioner's appeal allowed Montgomery to maintain jurisdiction over all of the matters in the divorce decree. Based on Richard's "affidavit" as to the proper jurisdiction for enforcing the protective orders, Montgomery refused the transfer and instead conducted a series of hearings requiring Petitioner repeatedly to re-urge her request for transfer and enforcement. In March of 1996, nearly two years after Petitioner's request, Montgomery finally did admit that Richard's affidavit was insufficient to prevent a transfer to Midland County and ordered the transfer. Although the threatened trip never materialized, Petitioner learned in discovery in the enforcement proceedings in Midland County that Richard had reported to his physician in January 1994, June 1994, and August 1995 that he was, in fact, having repeated epileptic seizures.

The divorce decree also contained a provision awarding each Hatteberg a 50% undivided interest in certain real property. In May and June of 1995, Gagnon sent letters to three of Petitioner's attorneys stating Richard had received an offer to purchase the property and was willing to accept the offer. Gagnon stated he and Richard were now ready to resolve both the issue of the division of the retirement benefits and the sale of the land. In response, Petitioner offered to either purchase Richard's interest in the property herself or to resolve both the issue of the property sale and the division of the retirement benefits but only if the account was properly divided as she was arguing in the appellate court it should be.

On January 16, 1996, the state appellate court issued mandate remanding the case to Montgomery for a "proper" division. Richard and his attorneys did not appeal to the Texas Supreme Court. Rather, on remand Gagnon requested that Montgomery enter another QDRO, which Gagnon again

approved as to form, again employing the *Berry* formula and again awarding Petitioner the same amount she had been awarded under the first QDRO. According to Gagnon, there was no need for Montgomery to make a different division of the community Plan assets on remand because the appellate court had been "confused" and this confusion had resulted in an "erroneous reversal" of Montgomery's use of the defined benefit formula.[1] Montgomery entered Gagnon's second QDRO in April 1996, and Petitioner appealed again.

On August 30, 1996, Gagnon requested that Montgomery appoint a receiver to sell the real estate Petitioner had offered to purchase the previous year and to order Petitioner to reimburse Richard for taxes he had allegedly paid on the property. Petitioner objected to the appointment of a receiver by Montgomery because there was no auxiliary suit before him supporting the appointment as required by Texas law – the matters affecting the child had been finally transferred to Midland County and the matter of the proper division of the retirement account was on appeal for the second time. Gagnon promptly "non-suited" the request for appointment of a receiver and filed a new lawsuit in Montgomery's court requesting that Petitioner be ordered to pay Richard money for property taxes. Gagnon used this new lawsuit to subpoena, obtain and review Petitioner's medical records – records completely unrelated to any issue in this new lawsuit. The Fulbright attorneys billed Richard in excess of $40,000 for their litigation-related expenses from March 1, 1996 through December 31, 1996.

On May 2, 1997, the Hattebergs reached a mediated settlement in which they agreed Petitioner would receive $400,000 from the community retirement assets, adjusted for

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[1]Subsequent Texas appellate courts have found that the court was not "confused" and have agreed that the *Berry* formula is not applicable to defined contribution accounts. *See Pelzig v. Berkebile*, 931 S.W.2d 398, 402 (Tex. App. – Corpus Christi, 1996, no writ); *Smith v. Smith*, 22 S.W.3d 140, 148-149 [Tex. App. Houston – [14th Dist.], no writ).

earnings or losses and other changes in value from December 31, 1991 until the date of distribution to her. After Petitioner dismissed her second appeal in accordance with this agreement, Gagnon and another Fulbright attorney, Respondent Jansen, who was now representing the Company on the QDRO matters, demanded that Petitioner agree that the amount to be awarded to her be reduced by "expenses" as a condition to entry by Montgomery of a third order.

II. Proceedings in the Courts Below.

Petitioner filed her original complaint in this case on December 10, 1997 and notified the Fulbright attorneys of the lawsuit on that same day. Her original complaint alleged multiple ERISA claims, sought a declaration of her right to entry of a QDRO, and requested that the district court enjoin termination of the Plan pending resolution of her claims. Two days later, Gagnon obtained Montgomery's signature on an order that did not contain the expense-reduction provision he and Jansen had demanded. On January 14, 1998, Mr. A.J. Harper II, another partner in the Fulbright firm, filed a motion to dismiss this federal suit, arguing Petitioner had filed the suit simply to harass Respondents and to circumvent Montgomery's jurisdiction. Petitioner renewed her request for a preliminary injunction, submitted evidentiary materials to show that she was likely to prevail on her ERISA claims, and argued that the Plan should not be terminated because it was entitled to restitution of the losses caused by those ERISA violations. She also wrote to the Company strongly suggesting it seek advice and representation from a non-conflicted source prior to making a distribution to her.

Respondents, still being represented by Fulbright, objected to Petitioner's request that the court enjoin termination of the Plan arguing that the Plan had already been terminated, that the IRS had approved the termination, that Petitioner had waived her right to object to the Plan's

termination, that Petitioner was responsible for the delay in getting a distribution because of her appeals, and that Petitioner had no chance of prevailing on the merits of her claims. On March 11, the Company made a tax-qualified distribution to Petitioner in the amount of $651,152.08 and to Richard in the amount of $832,940.97. Approximately one month after the distribution, another Fulbright partner, Mr. Jim Sales, represented to the district court, *ex parte*, that he would "assist the Court," that distributions had been made to the Hattebergs and that the Plan's trust account, now containing only $4,647.20, would remain open if the court granted a continuance of the injunction hearing. At the delayed hearing, Harper agreed to instruct the Company not to terminate the Plan's trust right away.

On June 12, the district court, *sua sponte*, appointed two special masters to advise it with respect to Petitioner's request for injunctive relief and instructed Petitioner to deposit $3,000 into the court's registry to help defray the special masters' fees. Petitioner objected to the appointment, arguing that her request to enjoin termination of the Plan required only an uncomplicated application of the law, that there were no exceptional conditions for the appointment as required by Federal Rule of Civil Procedure 53(b), *see* App. 81, that the appointment would unnecessarily increase the delay and expense of the litigation, and that she was unable to pay the fees.

The district court held another injunction hearing on June 30 in which one of the special masters participated. At this hearing, Harper agreed to instruct his clients not to terminate the Plan and its related trust pending final resolution of Petitioner's claims for restitution. He later agreed that the remaining account balance be placed in a no-fee ERISA trust so that the Hattebergs' retirement benefits would not be further reduced by the $30,000 Janczak had estimated the Plan was currently paying annually directly from the Hatteberg retirement benefits.

On July 1 and 2, the court entered a series of orders reappointing the special masters to recommend proper disposition of the merits of Petitioner's ERISA claims; withdrawing its order that she deposit funds into the court's registry but reserving the right to assess the special masters' fees at the conclusion of the case; denying Petitioner's motion for a preliminary injunction as "moot"; and ordering the parties to file motions for summary judgment. The court announced that the facts had been established and that it would attempt to resolve all or part of the controversy without discovery. App. 68, 70.

At the court's request, *see* App. 112-118, Petitioner amended her complaint to take account of the material events that had transpired since she had filed her original complaint: the entry of the third QDRO by the state court, the revelation from the amount finally distributed to her that her retirement assets had been seriously mismanaged during the years the account had been held captive in the Plan,[2] and the Company's refusal to provide her with the accounting ordered in the third QDRO. In addition to multiple ERISA claims, Petitioner's amended complaint alleged the attorneys committed malpractice in their representation of the Plan and of Petitioner, as a Plan beneficiary. In the alternative she claimed the attorneys are liable to her for negligent misrepresentation for failing to inform her of their dual representation during the state court proceedings. She claimed Richard and his attorneys abused the state court process and alleged twelve distinct claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), as amended, 18 U.S.C. §§1961-1968. Petitioner alleged the individual attorneys are liable under §§1962(a), (b), (c), and (d) for infiltrating the law firm through a pattern

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[2]Petitioner presented summary judgment evidence in the case currently pending before the Fifth Circuit, that had she received a distribution of $400,000.00 on December 31, 1991, the earnings on *her* investment choices of *her* retirement funds would have exceeded the earnings obtained by the Plan by $819,286.66.

of racketeering activity and for conspiring to do so; that the law firm is vicariously liable under §§1962(a) and (b) for the acts of the firm's attorneys that benefited the firm; that all of the partnership, corporate and individual Respondents are liable under §§1962(a), (b), (c), and (d) for infiltrating either the Company or the Plan or both, and conspiring to do so, and that the Company is vicariously liable under §§1962(a) and (b) for the acts of the Company's employees that benefited the Company. Petitioner alleged that the pattern of racketeering activities consisted of the Respondents' embezzlement of assets from the Plan, in violation of 18 U.S.C. §664; App. 89. obstruction of justice, in violation of 18 U.S.C. §1503; App. 90. giving and receiving kickbacks from the Plan, in violation of 18 U.S.C. §1954; App. 92. extortion as prohibited by 18 U.S.C. §1951[3]; mail and wire

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[3]This provision is entitled "Interference with commerce by threats or violence" and reads, in relevant part, as follows:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both. (b) As used in this section (1) The term ``robbery'' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. (2) The term ``extortion'' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right. (3) The term ``commerce'' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

fraud as prohibited by 18 U.S.C. §§1341 App. 89. and 1343; App. 90. interstate and foreign travel or transportation in aid of racketeering enterprises, prohibited by 18 U.S.C. §1952; App. 91. and state statutory fiduciary fraud. App. 120-151.

On September 25, 1998, in compliance with the court's July scheduling order, Petitioner filed a motion for partial summary judgment with respect to liability on some of her ERISA claims, and Respondents filed a motion for summary judgment on all of the claims in Petitioner's amended complaint. The parties filed their responses on October 15 and 16. Less than two weeks later, the district court entered a written opinion that Petitioner's RICO and state law claims should be dismissed. The court deferred consideration of the ERISA claims pending the special masters' report, which was due to be filed on November 17.

The special master's draft report was forwarded to the district court on November 20 and subsequently updated after a telephone call from the court. Another report was forwarded to the court on December 17 and then re-drafted yet again after another telephone conversation with the court. The final report was forwarded to the court on January 25, 1999. The special master found many ERISA violations and a need for continued discovery, but noted the absence of "credible" evidence supporting the fiduciary status of any Respondent other than the Company and recommended they be dismissed as defendants for alleged fiduciary breaches. App. 234-73. The report did not address any of Petitioner's non-ERISA claims. The final report was forwarded to the parties by order of the court nearly two months later, on March 22. On April 8, the court ordered Petitioner to retain counsel by May 19 and notified the parties that the special masters' fees, so far, amounted to more than $18,000.00.

On April 15, Petitioner filed a motion requesting that the district court reconsider its order dismissing the non-ERISA claims arguing, among other things, that the findings in the special master's report on the ERISA claims were in conflict with Respondents' claimed grounds for summary judgment

on the non-ERISA claims. On April 23, the parties filed a joint written status report on discovery indicating Respondents had supplied some additional documents and information in accordance with the special master's demands and disclosing that since the Plan's liquidation in 1994, the Plan had disbursed over $100,000 in "fees" for professional services. Two fee statements produced by the Fulbright attorneys for fees disbursed directly to them from the Hatteberg account show Gagnon conferred often with Goldhor and Jansen on the issue of the QDROs. However, Respondents refused to provide attorney fee statements showing any activities related to the QDRO dispute other than those for which fees were paid directly from the Hatteberg account.

On April 30, Petitioner filed her response to the special master's report and filed a Rule 56(f) affidavit. Respondents, on the other hand, accused the special masters of incompetence, bias, *ex parte* contacts with Petitioner, and misrepresentation of the law and the facts. On May 27, the special masters replied to these responses, noting that Respondents were being less than straightforward with the court and misleading the court with half-truths with respect to the applicable law; denying any improper *ex parte* contacts with Petitioner; pointing out Respondents' factual misrepresentations and the lack of authority for their legal conclusions; withdrawing his previous finding and recommending further discovery on the fiduciary status of Richard, Janczak and the attorneys; and concluding that the "sorry record" showed Respondents had committed "appalling multiple violations of ERISA." App. 292, 321.

The district court referred Petitioner's motion to reconsider, the parties' responses to the special master's reports, the discovery disputes, and Respondents' allegations of improper *ex parte* contacts to a magistrate judge. From May through September of 1999, Petitioner's retained attorneys participated in duplicative proceedings before the magistrate judge, re-urging the arguments she had previously

advanced. On September 28, Petitioner substituted herself for her retained attorneys because she could no longer continue paying for their services.

On December 16, 1999, in response to the magistrate's recommendation that the court not reconsider its prior entry of summary judgment for Respondents, Petitioner filed another Rule 56(f) affidavit. She requested that the district court include a certification pursuant to 28 U.S.C. §1292(b) in any final order on the non-ERISA claims and stay further proceedings pending her appeal. She also filed a motion for interim fees against Respondents as vexatious litigants under 28 U.S.C. §1927 and 29 U.S.C. §1132(g)(1)[4] to reimburse her for the $20,483.77 she had expended in complying with the court's order to retain counsel.

In a series of orders entered prior to the close of the millennium, the district court denied Petitioner's motion to reconsider its dismissal of the non-ERISA claims, denied her request for interim fees, denied her request for sanctions, denied her requests for certification and stay, and ordered a severance of and entry of final judgment on all of her non-ERISA claims. The orders contained the following observations: Petitioner's objections to the magistrate judge's report and recommendation were merely a reassertion of her previous arguments made in response to Respondents' motion for summary judgment.[5] Petitioner's motions to stay, for interim fees, and for sanctions were frivolous and Petitioner herself would be sanctioned if she filed any more frivolous motions. Petitioner would not get

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[4] This ERISA provision states: "In any action under this title . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. §1132(g)(1).

[5] The court did not "accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate." See 28 U.S.C. §636(b)(1)(C).

special treatment from the court regardless of Respondents' ability to afford sustained litigation. Petitioner lacked judgment, was unnecessarily abusive and insulting, too emotionally and personally involved in the litigation, and guilty of unprofessional conduct. Petitioner's claims of impropriety on the part of Montgomery and the attorneys during the state court proceedings had no basis in fact or law and were struck from the record. Petitioner's objections to the orders and opinions of the district court and the magistrate judge were denigrating and disrespectful and were struck from the record. If Petitioner repeated her allegations or continued to object to the proceedings, she would be held in contempt and all attorneys' fees, which might otherwise be available, would be denied. Petitioner was cautioned to read the rules governing the professional conduct of lawyers. She was to identify to the court any specific discovery she needed relevant to the ERISA claims.

Petitioner appealed the final judgment on the non-ERISA claims and requested a stay of the proceedings in the district court pending her appeal which the appeals court summarily denied. The district court's dismissal of the severed non-ERISA claims was subsequently affirmed in an unpublished, *per curiam* opinion. App. 25-31. Petitioner's motions for rehearing were denied on April 17, 2001. App. 74-75.

Meanwhile, back in the district court, the special masters had filed a fee statement for $29,264.75. On January 24, 2000, Petitioner filed a motion for production of certain documents. Two days later, Respondents produced more documents, however, they again objected to producing the time and billing records for any Fulbright fees not paid directly out of Plan assets on the grounds these records had no possible probative value in the litigation. On April 20, the district court denied Petitioner's motion to compel production of the attorneys' billing records, announced that there had been more than adequate time for discovery, and

ordered additional summary judgment motions to be filed. Petitioner noticed the depositions of Janczak and the Company and filed an affidavit outlining the areas that she would cover in the deposition. App. 333-35. She directed the Company to designate someone to testify on its behalf. Respondents moved to quash the depositions as being unreasonably cumulative and unduly burdensome and expensive. The court denied the motion to quash.

On May 25, Respondents produced Janczak to testify on behalf of the Company. Janczak testified she knows little or nothing about the matters Petitioner had stated she would cover in the depositions. The Fulbright attorney defending the deposition repeatedly instructed Janczak not to answer questions and continually invoked attorney-client privilege. App. 322-32

Throughout the remainder of June and July, the parties engaged in a virtual trial by affidavit, and on August 3, 2000 the district court entered final judgment for Respondents on all of Petitioner's remaining claims. App. 32-67. On August 16, Petitioner filed a motion for relief from judgment pursuant to Rule 60(b)(3). App. 322-32. The motion was denied. Petitioner filed notice of her second federal appeal on October 24, 2000. Petitioner's appeal of the judgment has been fully briefed and is currently pending before the Fifth Circuit in Cause No. 00-51109.

REASONS FOR GRANTING THE WRIT

I. THE SUMMARY DISMISSAL OF PETITIONER'S NON-ERISA CLAIMS UNDER RULE 56 AND THE SEVERANCE OF THOSE CLAIMS UNDER RULE 21 IS A VIOLATION OF PETITITIONER'S CONSITUTTIONAL RIGHTS AND CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS ON THE SCOPE OF A DISTRICT COURT'S DISCRETION TO DECLINE TO EXERCISE SUPPLEMENTAL JURISDICTION. IN ADDITION, THE FIFTH CIRCUIT EXCEEDED ITS OWN AUTHORITY BY FAILING TO ADHERE TO ITS PRECEDENT WITH RESPECT TO THE REQUIREMENTS OF RULE 56(f).

This Court has recognized that constitutional requirements of due process and the right to a jury trial cannot be abrogated by a federal court's discretion to construe and administer procedural rules. *Bank of Nova Scotia v. United States,* 487 U.S. 250, 254 (1988) (finding Fifth Amendment limitations on a court to interpret the Rules in order to dismiss a case); App. 78. *Beacon Theatres v. Westover*, 359 U.S. 500, 510 (1959) (finding Seventh Amendment limitations on a court to resolve factual issues in a case involving both equitable and legal claims). App. 78. Due process requires "an opportunity . . . granted at a meaningful time and in a meaningful manner, for a hearing appropriate to the nature of the case." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437-48 (1982) (citations and internal quotations omitted).

A. The district and appellate courts misused Rules 56(c) and (e).

In requesting summary judgment motions, the district court acknowledged that the proceedings would be conducted prior to

any discovery. App. 68. In addition, the court stated that it would not make a final decision on the summary judgment motions until after the special master had filed recommended findings of fact and conclusions of law on which both parties would have an opportunity to comment. App. 71, 73. However, five months prior to entry of the special master's report, the court granted Respondents' motion for summary judgment on all of the non-ERISA claims finding, among other things, that Petitioner had failed to present sufficient summary judgment evidence to "establish" some (but not all) of the predicate offenses to her RICO claims. App. 11-13. Respondents had not requested summary judgment on this ground, and the court gave Petitioner no notice that it intended to consider the propriety of summary judgment on this ground and no meaningful opportunity for her to respond. The district court could enter summary judgment *sua sponte* only if Petitioner was on notice that she was required to come forward with all of her evidence. *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). She was not. In finding that Petitioner had failed to present sufficient summary judgment evidence of the RICO predicate offenses, the district court dismissed the substantial summary judgment evidence presented by Petitioner in support of her related ERISA claims as showing nothing more than "a bitter divorce as well as possible ERISA violations, not amounting to criminal conduct." App. 11.

Petitioner responded to the court's new grounds for summary judgment and requested reconsideration in light of the special master's findings. App. 274-91. In denying the motion, the district court severed and entered final judgment on the non-ERISA claims in order to "facilitate" a separate appeal of those claims, finding the ERISA and non-ERISA claims were "separate and distinct." App. 23-24. The appellate court summarily denied Petitioner's request for stay in the district court pending the appeal. Ignoring the district court's grounds for summary judgment and reverting to those posited by Respondents, the panel found Petitioner had "failed to plead or establish the essential elements of her

RICO claim" because she did not come forward with summary judgment evidence, other than her complaint, that "establishes" a pattern of racketeering activity. App. 30.

Petitioner was not required to "establish" a pattern of racketeering activity in order to withstand summary judgment under Rule 56(e). Petitioner's burden was to respond to a motion for summary judgment that was "made and supported as provided in" Rule 56(c). Rule 56(c) allows a movant to make and support a summary judgment motion with "pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any" that show no fact issue for trial. In making and supporting their motion, Respondents did not refer to any depositions, answers to interrogatories, or affidavits. The only summary judgment material to which Respondents referred in their motion for summary judgment on the RICO claims was the settlement agreement attached to Petitioner's complaint in an effort to show that their racketeering activities had concluded with that agreement. App. 191-97. In fact, Respondents assumed for purposes of their argument that the conduct complained of in Petitioner's complaint was "wrongful." App. 194. They argued they were entitled to summary judgment as a matter of law on each and every RICO claim because all of the predicate acts occurred during a "prior" lawsuit (i.e., the state court proceedings).

In *Isquith v. Middle South Utilities, Inc.*, 847 F.2d 186, 195 (5th Cir. 1988), the defendants took the same tack in arguing their motion for summary judgment: they attempted "to use the complaint's allegations against plaintiffs; in essence, defendants are asserting that even if all of plaintiffs' factual allegations are true" defendants were entitled to prevail as a matter of law. In *Isquith*, the panel recognized the method defendants chose to use and treated the complaint's factual allegations as admissions or stipulations for purposes of the resolution of the motions for summary judgment. That is what the panel should have done in this case and that is why Petitioner was not required to come

forward with summary judgment evidence other than her complaint. *See also Malhotra v. Cotter & Co.*, 885 F.2d 1305 (7th Cir. 1989) (reversing grant of summary judgment because the defendant's motion had requested summary judgment on a purely legal ground and thus the plaintiff had no burden to produce evidence); *Hartman v. Board of Trustees of Community College Dist. No. 508*, 4 F.3d 465, 469 (7th Cir. 1993) (defendants' motion for summary judgment had contested the claim from a purely legal standpoint and did not attack the factual predicate of the claim, therefore plaintiff was "under no obligation to improve on it by adducing more specific facts, and the claim should not have been dismissed for her failure to do so."); *Tavery v. United States*, 32 F.3d 1423, 1427 n.5 (10th Cir. 1994) (defendant's motion was based completely on a legal argument and "not upon any other alleged weaknesses in [plaintiff's] case."). In summary, "[w]hen a party moves for summary judgment on ground A, his opponent is not required to respond to ground B – a ground the movant might have presented but did not." *Malhotra*, 885 F.2d at 1310 (Posner, J.).

B. The panel exceeded its authority in failing to adhere to its own precedent with respect to the requirements of Rule 56(f) and in entering an unpublished opinion.

In *Anastasoff v. United States*, 223 F.3d 898, *vacated on other grounds*, 235 F.3d 1054 (8th Cir. 2000), the Court recognized the constitutional implications that arise when appellate courts enter unpublished opinions with the proviso that the opinions are not precedent except in the case in which the opinion is entered. In this case, the panel's unpublished opinion illustrates the constitutional concerns raised by the Eighth Circuit.

In affirming the summary dismissal of Petitioner's non-ERISA claims, the panel held that the district court properly dismissed the claims on the merits under Rule 56 rather than

on the pleadings under Rule 12(b)(6) because Respondents included evidence with their motion for summary judgment and because petitioner failed to file a Rule 56(f) affidavit. App. 29-30. The panel's holding conflicts with the Circuit's prior published opinions requiring that a movant under Rule 56(f) need only "indicate to the court by some statement, preferably in writing (but not necessarily in the form of an affidavit), why he needs additional discovery and *how* the additional discovery will create a genuine issue of material fact." *Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1442 (5th Cir. 1993) (*citing International Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1677-67 (5th Cir. 1991), *cert. denied*, 502 U.S. 1059 (1992) and *Washington v. Allstate Ins. Co.*, 901 F.2d 1281, 1286 (5th Cir. 1990)); *see also Fontenot v. Upjohn Company*, 780 F.2d 1990, 1194 (5th Cir. 1986) ("While a party's failure to comply with Rule 56(f) procedure does not preclude consideration of the motion, some equivalent statement, preferably in writing or at least at the hearing of the motion, is expected); *Wichita Falls Office Assoc. v. Banc One Corp.*, 978 F.2d 915, 919 (5th Cir. 1993) ("The purpose of Rule 56(f) is to provide non-movants with a much needed tool to keep open the doors of discovery in order to adequately combat a summary judgment motion. Although it is preferred that non-movants present an affidavit to support a continuance of discovery, there is no stringent procedure that will bar litigants access to further discovery.").

In this case, Petitioner did comply with the Fifth Circuit's published precedent by indicating to the district court no less than five times in her response to Respondents' motion for summary judgment that discovery had not been done (a fact that the district court was well aware of), App. 213, 214, 217, 218-19, 227; and by detailing for the district court the issues needing to be addressed in discovery, App. 215. She argued that if the court found Respondents' had met their summary judgment burden merely by alleging there

was no evidence of her claims, it should grant a continuance for discovery. App. 212-15, 218-19.

Furthermore, although the district court did not schedule a hearing on the motions for summary judgment, the court specifically stated in scheduling the summary judgment proceedings that it would not rule on the motions until the parties had had an opportunity to review and comment on the special master's findings and conclusions. App. 71, 73. Along with her comments to the special master's report, Petitioner filed a motion for continuance and a Rule 56(f) affidavit. The panel, however, found Petitioner was required to file her Rule 56(f) affidavit "*before the federal district court ruled.*" App. 29 (emphasis added). This is not in accord with Circuit precedent or with this Court's finding that the general principle of Rule 56(f) is that "summary judgment [should] be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 n. 5 (1986). The panel disregarded that general principle and its own prior precedent.

C. The panel's finding that the district court did not abuse its discretion in declining to exercise supplemental jurisdiction over the related state law claims is in conflict with the decisions of other Courts of Appeals.

The district court also summarily dismissed the state law claims, either declining to exercise supplemental jurisdiction over them or finding them preempted by ERISA. App. 14-15. The panel approved these rulings without any discussion of their merit. App. 31.

This Court has recognized that "[u]nder the [Federal Rules of Civil Procedure], the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged." *United Mine Workers v. Gibbs*, 383

U.S. 715, 725 (1966). Congress codified this holding in 28 U.S.C. §1367(a) by stating that, with certain enumerated exceptions set forth in §1367(c), "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy . . . ." App. 96-97.

Respondents requested summary judgment on Petitioner's legal malpractice claim, arguing it was preempted by ERISA because the claim implicated the relationships between a beneficiary, the Plan, and its fiduciaries. They requested summary judgment on the merits of this claim arguing (1) Richard's attorneys could not be held liable to Petitioner, an adverse party, for wrongful litigation conduct; (2) Petitioner was not a client of the Plan's attorneys; and (3) there was no conflict between the representation of Fulbright attorneys of both the Plan and Richard and even if there was, attorney disciplinary rules do not give rise to a private cause of action. They argued that the negligent misrepresentation claim against the attorneys was also preempted by ERISA for the same reason the malpractice claim was preempted. App. 197-203.

The district court found the negligent misrepresentation claim preempted, citing a 1992 Fifth Circuit case without any further discussion but, extraordinarily, found the legal malpractice claim, pled in the alternative to the

misrepresentation claim,[6] not preempted. In the proceedings currently pending in the Fifth Circuit, however, the district court has done a complete about-face on the issue of preemption and has held that any improper activities on the part of attorneys, parties, or even state judges with respect to proceedings in state courts to obtain QDROs should be raised in state court and cannot be reviewed by a federal court. App. 49, 63.

This Court's opinion in *Gibbs* illustrates with precision why the district court abused its discretion in refusing to exercise supplemental jurisdiction and severing the non-preempted claims. In *Gibbs*, the plaintiff brought claims under the Labor Management Relations Act and under state common law. The case was tried to a jury and the jury found for the plaintiff on both the federal and state claims. The trial court set aside the award on the federal claim but entered judgment on the state claim. This Court held that the trial court did not abuse its discretion in maintaining pendent (now supplemental) jurisdiction over the state claim and found "the question whether the permissible scope of the state claim was limited by the doctrine of preemption afforded a special reason for the exercise of pendent jurisdiction." 383 U.S. at 727.

Moreover, several other Courts of Appeals have rejected the Fifth Circuit's implicit holding that the district court had unfettered discretion to refuse to exercise supplemental jurisdiction, reasoning that the scope of that discretion is bounded by the four factors listed in 28 U.S.C. §1367(c). *See Executive Software N. Am., Inc. v. United States Dist. Court*,

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[6]"Under the tort of negligent misrepresentation, liability is not based on the breach of duty a professional owes his or her clients or others in privity, but on an independent duty to the nonclient based on the professional's manifest awareness of the nonclient's reliance on the misrepresentation and the professional's intention that the nonclient so rely. Therefore, an attorney can be subject to a negligent misrepresentation claim in a case in which she is not subject to a legal malpractice claim." *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 792 (Tex. 1999) (citations omitted).

24 F.3d 1545 (9th Cir. 1994); *ITAR-Tass Russian News Agency v. Russian Kurier, Inc.*, 140 F.3d 443, 447 (2d Cir. 1998); *McLaurin v. Prater*, 30 F.3d 982, 985 (8th Cir. 1994); *Palmer v. Hospital Auth. of Randolph Cty*, 22 F.3d 1559, 1569 & n. 11 (11th Cir. 1994). None of these factors is present in this case.

D. Even if the district court's rulings in the case currently before the Fifth Circuit were legally correct, the proceedings employed by the district court are fatally flawed because they prevented Petitioner from obtaining a meaningful hearing on her claims.

As a result of the extreme bias exhibited by the district judge during the course of the proceedings on the non-ERISA claims, Petitioner felt compelled to request that he recuse himself under 28 U.S.C. §455(a) and (b)(1). App. 96, 336-342. The judge denied the motion and proceeded to dismiss the remainder of Petitioner's claims. App. 32-67. These second summary proceedings are fatally flawed not only because of the judge's obvious bias and the constitutional infirmity of the proceedings resulting from the severance of her related non-ERISA claims, but for several additional reasons.

As illustrated in Petitioner's motion for relief from judgment filed in the case currently pending before the Fifth Circuit, the judgment was obtained through Respondents' misconduct with respect to the Janczak deposition. App. 322-32. Further, the district court denied Petitioner attorneys' fees for the counsel it ordered her retain because she "continually asserted claims of extensive bad faith and conspiratorial conduct on the part of" Respondents. The court ignored ERISA's attorney's fee provision and instead made good on his previous threat to deny Petitioner attorneys fees if she persisted with her allegations against Respondents. The court did, however, tax the special masters' fees against Respondents because they had

"contributed in no small part to the length and complexity of this litigation." App. 66.

The court denied Petitioner relevant discovery and then used the absence of that discovery to determine there was no evidence to support her ERISA claims.[7] The court also resolved numerous factual disputes, all in favor of Respondents, completely ignoring the more rational findings of the special master. Compare App. 32-67 with App. 234-274 and 292-321. The court also made several credibility determinations, all in favor of Respondents.[8]

E. Conclusion.

The district court's severance of Petitioner's related claims into two causes of action was a clear attempt to manipulate appellate jurisdiction "through misapplication of rules of procedure in derogation of the finality requirements of 28 U.S.C. §1291." *Spencer, White & Prentis Inc. v. Pfizer Inc.*, 498 F.2d 358, 364 (2d Cir. 1974). Forcing Petitioner to appeal the non-ERISA claims while being subject to additional summary proceedings on the related ERISA claims in the trial court denied any meaningful hearing on any of her claims and thus violated her due process rights under the Fifth Amendment.

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[7]The court found that the only two invoices submitted as summary judgment evidence – those for fees paid directly to Fulbright out of the Hatteberg account – are "not enough alone to support an inference of influence" over the Plan by the Fulbright attorneys and there is no evidence the Fulbright attorneys gained control over the Plan assets and used that control against Petitioner in the state litigation. The court opined that the legal services reflected in these two invoices show only that Fulbright rendered "legal assistance . . . related to how the Plan Administrator should evaluate domestic relations orders that were subject to continued litigation . . ." and this limited work is insufficient to show that the attorneys manipulated the Plan in the course of the state court proceedings. App. 48-49, 61.

[8]For example, the court found that the Company's refusal to recognize Petitioner's rights under the Plan was due to a "mistaken understanding." App. 40.

The severance also had the effect of violating Petitioner's constitutional right to a jury trial under the Seventh Amendment on the factual disputes common to all of her claims. *See Brown v. Sandimo Materials*, 250 F.3d 120, 128-29 (2d Cir. 2001) (remanding a case in which ERISA and non-ERISA claims depend on common facts for a jury trial and instructing the district court to heed any factual determinations made by the jury and to grant relief under ERISA only if any legal relief available on the non-ERISA claims is inadequate).

II. THE FIFTH CIRCUIT'S DECISION THAT A PATTERN OF RACKETEERING ACTIVITY IS NECESSARILY ABSENT IN THIS CASE CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

The panel found that the common elements of any RICO claim are (1) a person, (2) engaged in a pattern of racketeering activity, (3) connected to the acquisition, establishment, conduct, or control of an enterprise. App. 30. The only ground advanced by Respondent for summary judgment on all twelve RICO claims that coincides with the only ground for summary judgment on all twelve RICO claims found to exist by the panel is the requirement that there be a pattern of racketeering activity. Although the panel did not elaborate on why Petitioner had failed to "plead or establish" a pattern of racketeering activity, its citation to *Word of Faith World Outreach Center Church, Inc. v. Sawyer*, 90 F.3d 118 (5th Cir. 1996) reveals that the court was affirming the dismissal of all the RICO claims based on the Circuit's precedent that if the alleged predicate acts are all part of a single, lawful endeavor, a pattern of racketeering activity cannot be shown. This holding conflicts with this Court's analysis of what constitutes a pattern of racketeering activity. *See H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 243 (1989) (continuity is

satisfied "where it is shown that the predicates are a regular way of conducting defendant's ongoing legitimate business (in the sense that it is not a business that exists for criminal purposes), or of conducting or participating in an ongoing and legitimate RICO 'enterprise.'"). As the panel recognized in *Sawyer*, its holding also conflicts with the holdings of other Circuits. 90 F.3d at 123 n. 4. *See United States v. Busacca*, 936 F.2d 232, (6th Cir. 1991) (in case alleging predicate acts of embezzlement from an employee benefit plan under 18 U.S.C. §664, lack of threat of continued racketeering activity cannot be asserted merely by showing fortuitous interruption of that activity).

Even if Petitioner's agreement to dismiss her second state court appeal could constitute the interruption of Respondents' activities, Respondents' subsequent refusal to abide by that agreement and the totality of the circumstances which have placed the parties before this Court show that at least some of the Respondents pose a threat of continuing criminal activity.

III. THE FIFTH CIRCUIT'S HOLDING THAT ERISA PREEMPTS STATE LAW CLAIMS ARISING OUT OF PETITIONER'S ATTEMPTS TO OBTAIN A QDRO IN THE STATE COURT PROCEEDINGS UNDERMINES THE INTENT OF CONGRESS AS EXPRESSED IN THE RELEVANT ERISA STATUTORY PROVISIONS.

As the district court has now implicitly recognized, the state law claims, arising as they do from Respondents' actions to prevent distribution of community retirement benefits under a qualified *domestic relations* order, obviously do not address an area of exclusive federal concern. Congress specifically intended that the distribution of community property under QDROs *not* be an area of exclusive federal concern by enacting the QDRO provision, 29 U.S.C. §1056(d)(3) and the QDRO saving provision, 29

U.S.C. §1144(b)(7). App. 97-105. At most, Petitioner's state law claims are several of "'myriad state laws' of general applicability that impose some burdens on the administration of ERISA plans but nevertheless do not 'relate to' them within the meaning of the governing statute." *De Buono v. NYSA-ILA Medical and Clinical Services Fund*, 520 U.S. 806, 807 (1997) (citations omitted).

Recently, in *Lorillard Tobacco Co. v. Reilly*, ___ U.S. ___, ___, 121 S.Ct. 2404, ___, 2001 WL 721016 *9-10 (June 28, 2001), this Court reiterated the bounds of preemption: "State action may be foreclosed by express language in a congressional enactment, by implication from the depth and breadth of a congressional scheme that occupies the legislative field, or by implication because of a conflict with a congressional enactment." None of these bases for preemption exists in this case; therefore, the panel's opinion that ERISA preempts Petitioner's state law claims is erroneous on this important issue.

CONCLUSION

This case presents serious questions of the constitutional authority of the federal courts, federalism, and abuse of the rule of law by those designated to enforce it. Accordingly, Petitioner respectfully requests a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit in this cause and in Cause No. 00-51109, which is currently pending in the Fifth Circuit Court of Appeals, in order to review and address these important issues.

Dated: July 13, 2001

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